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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1164

DEBORAH A. NORTHCROSS, et al.
Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

ERNEST G. KELLY, JR.
EVANS, PETREE, COBB & EDWARDS
900 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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Come the respondents and respectfully submit to the Court that the petition for certiorari heretofore filed by the petitioners-plaintiffs in this cause should be denied. *The leading question presented*—Did the Court of Appeals err in requiring that each party bear its own costs and attorneys' fees on appeal and in denying the request of petitioners for out-of-time consideration of their petition for rehearing and suggestion for rehearing *en banc*?

STATEMENT OF THE CASE

The petition for certiorari in this case grew out of proceedings for the adoption of a revised plan of desegregation for the Memphis City School System. In a hearing before the District Court, the petitioners-plaintiffs proposed the adoption of a plan of desegregation which was drafted by their expert witness and which was subsequently rejected by the District Court. Respondents opposed the implementation of a plan of desegregation based on the creation of a transportation system. The District Court adopted a plan of desegregation based on less extensive transportation than the plaintiffs sought but requiring the transportation of a projected 14,000 students and suggesting that additional transportation could be implemented at a later date. The decision of the District Court was appealed by both parties. On June 2, 1972, the Court of Appeals granted respondents' motion for a stay of the District Court order. This stay remained in effect until August 29, 1972, when a decision on the merits was reached by the Court of Appeals.

The PETITIONERS modified their position on appeal to recognize the fact that, after the granting of the stay order, a more drastic plan of desegregation could not be implemented by the start of the 1972-1973 school year. The principal effect of the Sixth Circuit Opinion, however, was to uphold the original decision of the District Court as against the previous positions of both the petitioners and the respondents, with the added proviso that a definite schedule for the implementation of a further plan should be adopted. Although the majority Opinion of the Court of Appeals did not expressly discuss the issue of costs and attorneys' fees, it appears that the Court would have denied such costs pursuant to its discretion under Rule 39(a) of the Rules of Appellate Procedure on the theory that there was

no clearly prevailing party on the two appeals and that each party should be allowed to bear its own costs. See *Merrill* v. *Builders Ornamental Iron Company*, 197 F. 2d 16 (10th Cir., 1952).

Following the petitioners' out-of-time application for rehearing and suggestion for rehearing *en banc*, the Court of Appeals acted on November 24, 1972, to deny this motion. No discussion of reasons for the denial was given.

REASONS FOR DENYING THE WRIT

Respondents submit that the writ of certiorari should be denied for two basic reasons. First, the record does not support the contention of the petitioners that the Court of Appeals abused its discretion in denying costs and attorneys' fees. Second, the action which petitioners seek to review was taken pursuant to a motion which was admittedly filed out of time with the Court of Appeals and the record is unclear as to what part of the failure of petitioners to file their motion on time affected the outcome in the Court of Appeals.

The statute on which petitioners rely deals with the discretionary power of the Court to award attorneys' fees to an action for school desegregation based on the Civil Rights Act of 1964 or on the Fourteenth Amendment of the Constitution of the United States. The statute is permissive in its language, providing that such an award may be made where ". . . the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Section 718, Emergency School Aid Act of 1972. Not only is this statute couched in permissive terms but it also requires a finding as to the necessity of the proceedings. No such finding has been requested of the Court

of Appeals and, accordingly, no opportunity has been afforded the respondents to present evidence with regard to the reasons for denying an award for attorneys' fees.

It should also be noted that the action of the Court of Appeals not only involves the statute but involves the discretion of the Court of Appeals under Rule 39a, Federal Rules of Appellate Procedure, to control the entire question of taxing the costs of cases on its own docket. There is no basis for presuming that Congress intended that the section quoted, involving the appropriateness of including attorneys' fees as a particular item of court costs, was also intended to have the effect of impinging on the discretion of courts of appeals with respect to their overall decisions in allocating costs. This case did not result in the implementation of the plan which was presented and proposed by the plaintiffs in the District Court. In fact, it left the entire matter of an appropriate final plan of desegregation in the lap of the District Court where it had resided prior to this appeal. Under these circumstances, the provisions of Section 718 dealing with items properly includable in a cost bill are irrelevant to the overall question of the power of the Court of Appeals to exercise its discretion as to the allocation of costs.

Respondents further submit that a grant of certiorari on the basis of the present record would prove awkward and improvident in light of the uncertainty surrounding petitioners' out-of-time filing of their motion before the Court of Appeals. It will be impossible to say to what extent the action of the Court of Appeals was based on the fact that no timely motion for an amendment of the Court's order was made by the petitioners and, under these circumstances, the further consideration of this matter by writ of certiorari will prove difficult and uncertain.

CONCLUSION

For the reasons given above, respondents submit that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

ERNEST G. KELLY, JR.
EVANS, PETREE, COBB & EDWARDS
900 Memphis Bank Building
Memphis, Tennessee 38103
Attorneys for Respondents